No. 71-876

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH A. NEMETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 85-89) is reported at 450 F. 2d 924. The opinion and order of the district court denying petitioner's motion for a new trial (Pet. App. 75-83) are reported at 309 F. Supp. 1336.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1971 (Pet. App. 85), and a petition

for rehearing was denied on December 3, 1971, (Pet. App. 97). The petition for a writ of certiorari was filed on January 5, 1972, and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ruling of the courts below that petitioner voluntarily furnished records and made exculpatory statements to Internal Revenue Service agents was erroneous.

2. Whether Internal Revenue Service agents are required to notify a taxpayer prior to requesting a bank to disclose information to the agents concerning accounts maintained with the bank by the taxpayer.

3. Whether the government, in its computation of petitioner's income, erroneously failed to credit petitioner with known deductions or to investigate possible additional deductions.

STATEMENT

Petitioner, who conducts a roofing and construction business (Pet. App. 78-79), was convicted, after jury trial, of willfully attempting to evade his income taxes for the years 1962-1967, inclusive. He was sentenced to pay fines totalling $15,000 and the costs of prosecution, and to serve a term of imprisonment of 179 days and, thereafter, to a further term of probation for three years. (R. 1055a.)[1] As noted

[1] "R." references are to the five volumes of the appendix filed in the court of appeals.

by the courts below (Pet. App. 78, 86), the evidence of guilt was "overwhelming," and the government's proof of specific items of unreported business receipts tended to show the following variation between reported and unreported income (Pet. App. 86; R. 714a-723a):

	Taxable Income Per Return	Proven Taxable Income
1962	$3,252.67	$26,860.40
1963	2,906.91	33,377.43
1964	337.35	7,873.47
1966	5,037.94	63,332.91
1967	4,083.98	12,061.03

The investigating Special Agent was assigned to this case in March 1968, and on May 2, 1968, initiated a phone call to petitioner in which the agent stated that he was assigned to investigate petitioner's returns for 1964, 1965 and 1966. The agent requested an appointment for a discussion and inspection of petitioner's books, records and cancelled checks. Petitioner agreed to meet the agent at 9 a.m. at petitioner's place of business. (R. 352a-353a.)

At the outset of the appointed meeting on May 6, 1968, the agent, in accordance with the Internal Revenue Service directive then in effect,[2] displayed

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[2] See Internal Revenue Service News Release No. IR-897, Oct. 3, 1967. (Deft. Exhibit K; R. 1079a.) This News Release states in part as follows:

"On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a

to petitioner his badge and credentials and informed petitioner that the agent's function was to investigate possible criminal tax violations, and that petitioner could refuse to furnish incriminating information or documents. At this point, petitioner volunteered a statement that he understood he had the right to have an attorney present during the interview and the agent told petitioner that he did have this right. (Pet. App. 87; R. 354a, 371a-372a.) The petitioner then stated he wished to proceed with the interview without an attorney. (R. 355a.) The district court found that petitioner received "what was substantially a *Miranda* [384 U.S. 436] warning" and that the records and exculpatory statements furnished by petitioner at this interview were given freely and voluntarily." (Pet. App. 76.)

In the course of his investigation, the Special Agent inspected bank records of accounts maintained by petitioner, and from inspection of microfilm copies of checks deposited by petitioner, the agent located some 50 witnesses whose payments to petitioner for services were not recorded in the latter's records. (R. 506a, 515a.) In some instances, the agent served a summons on the bank pursuant to Section

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special agent, I have the function of investigating the possibility of criminal tax fraud.'

"If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

7602 of the Internal Revenue Code of 1954.[3] (Pet. App. 88; R. 106a-107a.) In some instances, the agent sent letters of inquiry to the customer whose name was discovered in the bank's microfilms. (R. 515a.) Petitioner's motion to suppress the evidence accumulated by the agent (R. 4a-6a) asserted, *inter alia*, that petitioner was entitled to notice of all inquiries and summonses to third parties so that he could in-

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[3] Section 7602 of the Internal Revenue Code of 1954 provides as follows:

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

tervene and participate in such inquiries. In this connection, petitioner called to the stand certain bank officials, who testified that, under the standards of the banking business, customer relations were "confidential." (R. 198a, 214a, 245a, 261a, 268a.) The district court heard and overruled petitioner's contention (R. 107a), and the court of appeals held that petitioner would not have been entitled to intervene in the inquiries by the agent. (Pet. App. 88.)

When interviewed by the agent on May 6, 1968, petitioner stated that his tax returns correctly listed all income and expenses and he did not then, or at any time prior to the trial, claim that he was entitled to additional expense deductions. (R. 547a.) Petitioner maintained a checking account, but he told the agent that he paid his expenses in cash and that some of the spiral notebooks reflecting these expenses had been stolen from his office (R. 548a), which was totally destroyed by fire in 1969 (R. 898a). In the course of his investigation, the agent contacted petitioner's banks and suppliers and discovered additional business expenses for interest and for supplies totalling $18,686.29. The agent allowed these expenses. (R. 559a-560a, 632a, 652a.) At the conclusion of the agent's investigation, petitioner was furnished a written summary of the unreported income and was given an opportunity to furnish explanatory material. (R. 633a-634a.) With the exception of one witness who testified that petitioner paid him $1,620 in 1962 for rental of scaffolding (R. 948a), all the defense witnesses called from supply houses either confirmed the information they had given to the agent

(R. 762a) or stated that they had no records showing cash payments by petitioner or were unable to make a thorough examination of their old records on the short notice allowed to them by defense subpoenas. (R. 756a-757a, 942a-943a.) The district court overruled petitioner's contention that the government's burden of proof also required it to show that petitioner had no additional unreported deductions. (Pet. App. 78-81.)

ARGUMENT

1. Petitioner contends (Pet. 13-51) that he was given neither the warning to which he was entitled by Internal Revenue Service directive nor the warning required by the decision in *Miranda* v. *Arizona*, 384 U.S. 436. The Internal Revenue Service directive of October 3, 1967, *supra*, however, does not apply to such limited communications as the May 2, 1968, phone call in which the agent arranged to meet petitioner on May 6, 1968. This is apparent not only from the requirement in the directive that the agent exhibit his credentials, which cannot be done by telephone, but also from the directive issued by the Internal Revenue Service in 1968[4] in which it appears that the

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[4] See Internal Revenue Service News Release No. IR-949, November 26, 1968. This directive reads in part as follows:

> At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any docu-

"initial contact" referred to in the 1967 directive is the first actual "meeting" between the agent and the taxpayer.

As the district court found at the May 6, 1968, interview the petitioner was given warnings which substantially complied with the *Miranda* formula, and he acted freely and voluntarily in supplying records and making exculpatory statements. In any event, most circuits hold the *Miranda* rule inapplicable to an Internal Revenue Service interview in which there is no element of custodial or coercive restraint. *United States* v. *Jaskiewicz*, 433 F. 2d 415 (C.A. 3), certiorari denied, 400 U.S. 1021, and cases there cited. Only the Seventh Circuit is in conflict with this view. *United States* v. *Dickerson*, 413 F. 2d 1111, 1117 (C.A. 7). But see, e.g., *United States* v. *Lockyer*, 448 F. 2d 417, 422 (C.A. 10). The First and Fourth Circuits adhere to the majority view, but have ruled that there is a denial of due process if a Special Agent fails to give a taxpayer the warning required by the applicable directive published by the Internal Revenue Service in 1967 and 1968, *supra*. *United States* v.

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ments, and that he has the right to seek the assistance of an attorney before responding.

Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

IRS has made no change in its existing instructions that if it become necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. * * *

Leahey, 434 F. 2d 7, 9 (C.A. 1); *United States* v. *Heffner*, 420 F. 2d 809, 812 (C.A. 4). The warnings given to petitioner by the Special Agent on May 6, 1968, fully comport with the 1967 directive of the Internal Revenue Service.

2. Petitioner also contends (Pet. 52-69) that testimony concerning his bank deposits should have been suppressed because that information was confidential and that he should have been notified so that he could have applied to intervene when the government sought the information from the banks. Since the petitioner was permitted to raise the issue of confidentiality with respect to his motions to suppress before trial, at trial and after trial, he has not been prejudiced by his non-intervention into the dealings between the government and the banks. *Donaldson* v. *United States*, 400 U.S. 517, 531; *United States* v. *Blue*, 384 U.S. 251. In any event, petitioner had no protectable interest which would have formed the basis of an application to intervene. *Donaldson* v. *United States*, 400 U.S. 517, 530; *United States* v. *Newman*, 441 F. 2d 165 (C.A. 5); *Application of Cole*, 342 F. 2d 5, 7-8 (C.A. 2), certiorari denied, 381 U.S. 950; *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1). Bank records are not privileged. *Stone* v. *Williams*, 356 F. 2d 934 (C.A. 1); *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7), certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919; Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates, §§ 501, 510.[5]

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[5] Even assuming that the petitioner had a protectable interest, there still would be no requirement that he receive

3. Petitioner argues (Pet. 69-74) that the prosecution, by not aiding the petitioner in proving additional expenses to those claimed on the return, in effect suppressed evidence within the meaning of *Brady* v. *Maryland*, 373 U.S. 83. *Brady* was a murder case in which the prosecution suppressed the fact that someone other than the accused had confessed to the crime. Its holding does not impose on the government a duty affirmatively to seek or find evidence favorable to the defense. In any event, where its proof consists of specific items of unreported income rather than a circumstantial method of proof such as net worth or bank deposits, the government need only allow a taxpayer such costs and expenses as he has claimed on his return and such other deductions as have come to the government's notice. The Special Agent here was given no suggestions by petitioner as to additional expenses, but he nevertheless sought out and allowed a large amount of additional business expenses. The government was required to go no further. *United States* v. *Stayback*, 212 F. 2d 313, 317 (C.A. 3), certiorari denied, 348 U.S. 911; *United States* v. *Shavin*, 320 F. 2d 308, 311 (C.A. 7).

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notice. Rule 24 of the Federal Rules of Civil Procedure, which would be applicable in a summons enforcement procedure (*Donaldson* v. *United States*, *supra*, p. 528), does not make any provision for giving notice to prospective intervenors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY, 1972.

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